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82-1935

No.

IN THE

Supreme Court of the United States

October Term, 1982

DEMYAN'S HOFBRAU, INC.,

Petitioner,

vs.

INA UNDERWRITERS INSURANCE CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the finding of incendiarism by the District Court, made without benefit of a trial transcript, in conjunction with the Court's refusal to specify its reasoning for discounting impartial expert testimony which the Court, in its opinion, gave no comment whatsoever for ignoring or discrediting, constitutes reversible error in violation of Rule 52(a) of the Federal Rules of Civil Procedure thereby violating petitioner's rights of due process under the United States Constitution.

2. Whether the erroneous paraphrasing of critical expert testimony by the Court of Appeals for the Second Circuit constitutes reversible error in upholding the District Court's decision.

3. Whether the District Court's determination of the incendiary, non-accidental character of the fire in question constitutes a violation of petitioner's rights of due process under the United States Constitution, as said decision necessarily exposes petitioner to potential criminal prosecution for arson and limits petitioner's ability for future economic gain, having been found an arsonist.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No.

DEMYAN'S HOFBRAU, INC.,
Petitioners,

vs.

INA UNDERWRITERS INSURANCE CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The law firm of Weg, Myers & Jacobson, P.C., on behalf of Demyan's Hofbrau, Inc.,* petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Memorandum Decision, Findings of Fact and Conclusions of Law, and the Judgment of the United States District Court for the Southern District of New York, all dated July 15, 1982 are reported at 542 F.Supp. 1385 and are printed as Appendix C herein. The Decision of the United States Court of Appeals for the Second Circuit from which certiorari is sought dated January 6, 1983 affirming the decision of the

*Demyan's Hofbrau, Inc. is a closely held New York corporation with no parent companies, subsidiaries or affiliates and owned by John Demyan.

District Court, is not reported and appears as Appendix B herein. The order of the Second Circuit denying the petition for rehearing and the Suggestion for Rehearing en Banc, dated March 1, 1983, is not reported but is printed as Appendix A herein.

JURISDICTION

The Court of Appeals decision in these cases was rendered on January 6, 1983 (App. B). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on or about January 20, 1983 and denied on March 1, 1983 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in relevant part:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

2. Rule 52(a) of the Federal Rules of Civil Procedure provides in relevant part:

> "In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon, . . ."

STATEMENT OF THE CASE

Demyan's Hofbrau, Inc. a New York corporation,

began operations in 1959 as a restaurant and catering business at 730 Van Duzer Street, Staten Island, New York. The restaurant was started by John P. Demyan and his brother, Francis Demyan, who each had fifty percent (50%) ownership in the business.

On July 18, 1979 INA Underwriters Insurance Company (hereinafter "INA") issued to Demyan's fire insurance policy number RMPD0218364A insuring Demyan's for a period of one year against loss by fire and its effects. The INA policy was subject to a limit of liability of three hundred thousand dollars ($300,000.00) applicable to the building on the premises, and one hundred fifty thousand dollars ($150,000.00) applicable to the contents within the building.

Shortly before 5:00 a.m. on January 8, 1980 the building and personal property within suffered major damage from a three-alarm fire which required 11 hours of firefighting activity before it was extinguished.

Subsequent to the fire INA made demands pursuant to the statutory terms of the policy including the submission of sworn proofs of loss and examination under oath which were complied with by John and Patricia Demyan.

Thereafter, INA denied liability on Demyan's claim and on February 18, 1981 Demyan's instituted suit against INA in Supreme Court of New York for Richmond County to recover the proceeds under the policy.

Demyan's action commenced against INA in New York Supreme Court for Richmond County was removed by INA from that Court to the United States District Court for the Eastern District of New York on March 16, 1981. On March 18, 1981 INA answered Demyan's complaint denying liability based on the affirmative defenses of arson and fraud and false swearing.

By stipulation of the parties and Order of the Court (Judge Milton Pollack) the action in the Eastern District of New York was discontinued and removed to the District Court for the Southern District of New York. Also pursuant to that Order and Stipulation, the plaintiff INA and defendant (Demyan's) were reversed, and the Amended Answer of Demyan's was made the Complaint and the reply to Demyan's counterclaims by INA was deemed as the Answer.

This case was tried without a jury before Federal District Judge Milton Pollack on May 24, 25 and 26 and June 2, 1982.

During the trial, evidence was received on all contested issues including Demyan's claim of liability and damages, INA's affirmative defenses, and plaintiff's rebuttal evidence to those defenses.

Immediately upon the conclusion of the trial on June 2, 1982 and without the benefit of a trial transcript, Judge Pollack from the bench and on the record entered an interim decision and held as a finding of fact that the fire that occurred at Demyan's Hofbrau on January 8, 1982 was of non-accidental, incendiary origin (App. C).

That interim decision was later incorporated by the Court into its final decision of July 15, 1982 and states as follows:

> "It has been clearly proved by the defendant and not contradicted by any acceptable evidence worthy of belief, that the fire on January 8, 1980 was of incendiary, non-accidental origin. There were two and perhaps three points of origin of fire, separate and separated, which were caused in each location by a supplied flammable liquid or accelerant to the premises. There was no evidence which is credited by the court of any other cause for the outbreak of the fires. The location of the points of origin and the inverted cones and the pooling make it clear and convincing beyond peradventure of doubt that arson was the cause at each of the two or perhaps three separate and separated portions of the insured premises. (App. C)"

On July 15, 1982 Judge Pollack rendered a decision and Findings of Fact. In that decision the Court incorporated its prior interim decision and finding that the fire at Demyan's was incendiary in origin. In its final decision the Court went on to find by circumstantial evidence that INA was not liable under the policy by reason of arson.

This decision was appealed to the Court of Appeals for the Second Circuit, which affirmed the Decision of the District Court on January 6, 1983 (App. B). Petition for Rehearing and the suggestion for Rehearing En Banc was denied by the Second Circuit on March 1, 1983.

Plaintiff-appellant's appeal to this court concerns only the Trial Court's finding of fact and the appellate court's affirmance thereof, incorporated into the final

decision, that the fire of January 8, 1982 was incendiary in origin and intentionally set, which finding was a prerequisite to the Trial Court's ultimate finding of arson in this case. If the fire was not incendiary it is axiomatic that the Insurance Company's defense of arson must fail.

ARGUMENT

Rule 52(a) of the Federal Rules of Civil Procedure outlines the requirements regarding findings of fact and conclusions of law in actions tried without a jury. Specifically, Rule 52(a) provides that in non-jury actions ". . . the Court shall find the facts specially . . ." Fed. R. Civ. P. 52(a). While it is true that extensive discretion must necessarily be imparted to the trial judge, findings of fact can and should be set aside where, as here, such findings are clearly erroneous.

Ordinarily, an appellate court must abide by a lower court's factual determinations and presume such findings correct. *United States of America v. United States Gypsum Company et al.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948). This is *not* the case where such determinations lack evidentiary support or are against the weight of the credible evidence, *Gypsum, supra*, and the following arguments will demonstrate such is the situation in the case subjudice.

A. The Interim Findings and Ultimate Decision Of The District Court Violate FRCP 52(a) and Petitioner's Rights Of Procedural Due Process Under the United States Constitution.

In the instant case, tried without a jury, the trial

court made interim findings of fact, without reference to the trial transcript, regarding the incendiary nature of the fire. In these findings the Court stated that the defendant had demonstrated that the fire in question was of an incendiary, non-accidental origin and that such origin was ". . . not contradicted by any evidence worthy of belief. . . ." (App. C) Yet the testimony of Battalion Chief Francis T. Gallagher, the commander of the fire company which responded to the alarm, an impartial eyewitness and highly experienced expert, unequivocally refuted these interim findings in his testimony.

Chief Gallagher was subpoenaed by plaintiff and testified as to his knowledge of the events surrounding the fire in question. Despite the introduction into evidence of the Battalion Chief's official fire report which he signed, he testified from his independent memory of the events. His testimony was in all ways consistent with his aforementioned signed official report.

Too much emphasis or significance cannot be given to the testimony of this witness. It was readily apparent that the witness did not favor either side of the litigation. His testimony was forthright and unequivocal. He did not vacillate and was responsive to both counsel on direct and cross-examination, having a clear recollection of the events which were the subject of his testimony. His background included 32 years in the fire department.

The District Court in its interim findings and in its ultimate decision does not specify or make any comment whatsoever as to why the testimony of this crucial witness was totally disregarded.

Further, to make its determination, the Court must not only have ignored the testimony of this eyewitness with knowledge of the fire as it actually existed, but must necessarily have relied upon the testimony of witnesses who merely examined a 'cold' or extinguished fire one day thereafter. Such witnesses did not even benefit from the results of scientific determinations as none were conducted by these experts.

As the finding is therefore not supported by the weight of the evidence, said finding comports with the long standing criteria for reversal of such findings under the "clearly erroneous" doctrine of Rule 52(a) of FRCP. *Gypsum, supra.*

To arrive at the conclusion that the fire was incendiary and non-accidental in origin, the District Court was compelled to rely upon the demeanor of Respondent's witnesses at trial. Clearly, this is permissible within the parameters of Rule 52(a). *Gypsum, supra.* Yet, here the Court's findings were based on the in-court testimony of only one witness, a fire marshall who was not an eyewitness to the fire, but examined the scene one day thereafter. Testimony supportive of this sole in-court witness for the defendant was augmented by testimony of another fire marshall deposed prior to trial, and excerpts of said prior deposition were included in the record. Obviously, the non-appearance of this witness at the trial of the action did not permit the Trial Court to make any observation as to the witness' demeanor or credibility. This therefore mandates a reverse application of the above stated rule, to wit: testimony of witnesses who did not appear before the trial court is *not* unassailable. In point of fact, the "clearly erroneous" standard is

lessened where depositions are reviewed and employed at the trial court level. *Emmco Ins. Co. v. Wallenius Carribean Line S.A.*, 492 F2d 508, (1974.) This further exemplifies the inadequacy of the Trial Court's Decision as regards its failure to evaluate adequately the testimony of the witnesses. Furthermore, the non-testimonial evidence of the Chief's fire report, exactly corresponding with the Chief's testimony, could be reviewed by the appellate court and this court on the same evidentiary basis as the Trial Court. While it is true that findings of the District Court need not include detailed statements of the effect of the testimony of conflicting witnesses, it is likewise true that in such situations the findings will stand only if there is substantial evidence to support it. *Ruby v. American Airlines Inc.*, 329 F.2d 11, 1964.

Through this neglect of weighty, pivotal testimony and the accompanying refusal to address with specificity its reasoning for such neglect, the District Court impermissibly denied petitioner due process under the Constitution by failing to comply with Rule 52(a) of the Fed. R. Civ. P. For in the case at bar petitioner has been judicially found to be an arsonist but without knowing the reasons therefor. This violation of petitioner's constitutional rights of procedural due process is the very thing Rule 52(a) was designed to prevent as a check upon the extensive power of a District Court Judge sitting as the trier of fact.

B. The Erroneous Paraphrasing of Testimony by the Court of Appeals for the Second Circuit.

The verbatim testimony of Chief Francis Gallagher clearly and unequivocally demonstrates

that the Judgment of the District Court was erroneous and such testimony was paraphrased in error by the Court of Appeals for the Second Circuit in an Order dated January 6, 1983.

Petitioner disputes the accuracy of the paraphrased testimony of Chief Gallagher set out in said Order and upon which testimony the Court's Order hinged, to wit:

> "In response to plaintiff's questions, Gallagher testified that he would have observed any lower level fires that had been started by 'accelerant', that he did not observe any lower level fires, and that the fire originated in an air space below the ceiling. In response to defendant's questions Gallagher testified that visibility within the building was 'almost zero', that lower level fires close to the entrance from which Gallagher made his observations would have been extinguished before he entered the restaurant, and that when he made his observations he was primarily concerned with tasks more urgent than establishing the origin of the fire." (App. B)

Petitioner contends that the verbatim testimony of Chief Gallagher is contrary to the Circuit Court's paraphrasing of his testimony, specifically that

> "Gallagher testified that the visibility within the building was 'almost zero', that lower level fires close to the entrance from which Gallagher made his observations would have been extinguished before he entered the restaurant. . . ." (App. B)

The verbatim and unequivocal testimony of the Fire Chief is contrary to the Court's paraphrasing of his testimony that "the visibility *within the building* was almost zero." The complete testimony on this

point is as follows:

Petitioner's Direct Examination:

Q. Now, Chief, I ask you to recall as carefully as you can, as you entered the building some five minutes after arrival when part of your men were engaged in their various firefighting attempts and *you climbed a flight of steps inside the building,* which put you on whatever level it is, did you see any fire below and in back of you? (Emphasis added)

A. No, I didn't.

Q. Was there any heavy smoke coming from below and in back of you?

A. That's hard to tell where the smoke was coming from. It was very heavy, the visibility was almost zero.

Q. I'm referring, when I ask you that question, to the area immediately adjacent to the right of the entrance that you entered, an area that's been described during the course of this trial as exposure two.

A. It was smoky but it wasn't what they call pushing. There was no pressure behind it.

Q. If you had to classify the smoke and there are three classifications in the fire department, are there not, light, medium and heavy, is that correct?

A. That's correct.

Q. Could you tell us whether the smoke that was coming from there fell within one of those classifications?

A. It was a heavy smoke condition.

Q. And how about up above?

A. It was very heavy upstairs on the floor they were working on. They only got in on the floor maybe ten foot where they were working on the ceiling and that was it.

Q. Would you say that the smoke upstairs, and I notice you said it was very heavy, was it heavier than the smoke downstairs?

A. Yes, it was.

Q. Decidedly so?

A. Yes. Very heavy.

First, it is clear from the above transcript testimony of the Chief that when the Chief testified "the visibility was almost zero", this was *not* an observation made by the Chief from the entrance but *inside and atop an interior flight of stairs where the fire company was fighting the fire.*

It is therefore clear that the Court's opinion is in error where it states "... the entrance from which Gallagher made his observations".

It is unquestionable that when the Chief testified visibility was "almost zero" he was testifying as to the visibility at the top of the stairs from where he made this observation, *not* the entrance, and this verbatim testimony was in response to the question:

Q. [from the vantage point at the top of the interior stairs] ... did you see any fire *below and in back of you?*

A. No. I didn't.

Q. Was there any smoke coming from *below and in back of you?*

A. That's hard to tell where the smoke was coming from. It was very heavy, the visibility was almost zero. [from the Chief's point of observation which was then atop the interior stairs where the fire was being fought and not the entrance]

The Court of Appeals omitted further testimony of Chief Gallagher which clearly differentiated his ability to observe and the visibility at *each* of the *two* observation points, the entrance and atop the interior stairs.

> Q. Would you say that the smoke upstairs and I notice you said it was very heavy, was it heavier than the smoke downstairs [at the entrance]?
>
> A. Yes, it was.
>
> Q. Definitely so?
>
> A. Yes. Very heavy.

It is clear that contrary to the Court's paraphrasing of the Chief's crucial testimony in its opinion, the word-for-word testimony clearly establishes: (1) the Chief did not make all his observations solely from just the entrance near the place where defendant alleges the fire to have originated, but from two points, the entrance and atop the inside stairs where the firefighting was going on, and (2) when the Chief testified visibility was "almost zero" he did not testify that was the condition "within the building", as the Court paraphrased, but on the contrary, was solely the visibility described by the Chief from his observation point *not at the entrance, but* atop the interior stairs where the firefighting was then taking place.

Any scintilla of doubt as to the points of the Chief's observations and as to the visibility and smoke conditions at those points vanishes upon reading the above-quoted testimony of the Chief wherein he clearly differentiates the smoke conditions and visibility at the entrance, versus the smoke and visibility when he was atop the interior stairs:

Q. Would you say the smoke upstairs, was it heavier than the smoke downstairs?

A. Yes, it was.

Q. Decidedly so.

A. Yes. Very heavy.

Thus it was *not* the Chief's testimony that visibility "*in the building* was almost zero" (emphasis added) but that visibility was "almost zero" *atop the interior stairs where the Chief made this observation.* Visibility was *not* "almost zero" at the entrance which was not the Chief's only point of observation, and was not the point of observation where the Chief testified he observed visibility "almost zero".

Petitioner further contends the Court made additional error in paraphrasing the testimony of Chief Gallagher, to wit:

> "that lower level fires . . . would have been extinguished before he entered the restaurant . . ."

The above-paraphrased testimony of the Chief appears verbatim in the record on the Chief's cross-examination as follows:

> Q. If there was a fire burning right there [adjacent to the entrance] . . .
>
> Q. If there was a fire in that little room where that door was that he forced and where the windows were, would normal operating procedures of that engine company be to knock down and put out those flames, first?
>
> A. Yes. He would never—
>
> MR. WEG: Excuse me. I don't object to the

hypothesis but it suggests a conclusion that's contrary to this witness' testimony.

THE COURT: He's asking a hypothetical question as to what the duties would be if they saw flames on arrival at that location.

MR. WEG: I don't understand that to be his question.

THE COURT: That's what I understood the question. Didn't you understand that's what he was talking about?

THE WITNESS: Yes, sir.

Q. They knocked the flames down that they saw right there, if they saw them, right?

A. Yes.

Q. They would put out the flames to the extent they could with their hose lines in that little enclosed room right there, is that right?

A. That's correct.

Petitioner now contends, as properly asserted at trial in its objection to the above hypothetical question posed to the Chief, that the Chief was testifying to a *hypothetical question*, the bases for which were facts not in evidence and contrary to the Chief's own testimony that:

"[Fire] was at no place at all in the interior."

Furthermore, the Chief made the above observation at the entrance of the building and *not* atop the inside stairs where visibility was "almost zero" and where the smoke was "decidedly heavier" than at the entrance.

Even conceding, arguendo, the propriety of the

said hypothetical question, any possibility that there was already a fire fueled by accelerant at the entrance, but extinguished before the Chief got there, is totally foreclosed by the Chief's verbatim testimony on redirect examination which the Court of Appeals omitted from its opinion, as follows:

MR. WEG:
Q. Take on the hypothesis that Mr. Young just gave you assuming that a fire originated at the entrance on the right—

THE COURT: He didn't say originated. He said existed. He didn't say originated.

Q. A fire was burning—

THE COURT: That's better.

Q. —at the point we have just described, would you say—withdrawn.

Did you see any evidence of anybody having fought such a fire on your way up there?

A. *No. I didn't see any fire at all there.*

Q. And on your way up there, would you have seen evidence of such a fire having been fought either by water or hoses or personnel?

MR. YOUNG: Objection.

THE COURT: Overruled.

A. *Yes, I probably would have.*

Q. And particularly so if this burning were accelerated by use of an accelerant?

MR. YOUNG: Objection.

THE COURT: Overruled.

A. Yes.

Q. *Yes, you would have seen it?*

A. *I would have seen it, yes.* (Emphasis added)

As stated, the Chief's testimony was that visibility *atop the interior stairs* (*not* at the level of the entrance) "was almost zero" with smoke conditions "decidedly heavier" than at the entrance. It was at this entrance that the Chief testified:

> "*No. I didn't see any fire at all there.*" (Emphasis added)

And the Chief testified if a fire had been fought at the entrance he "probably would have" seen "evidence of such a fire having been fought and such a fire was fueled with accelerants".

The Chief stated he "would have seen" the fire or evidence of one having being fought.

This crucial re-direct testimony of the Chief was completely ignored by the Circuit Court in its Opinion!

Therefore, the word-for-word testimony of Chief Gallagher, which is the most crucial in this case as he was the sole eyewitness expert to testify, clearly demonstrates that the Court of Appeals for the Second Circuit, in hinging its opinion on the Chief's testimony, incorrectly paraphrased the testimony.

Therefore, based on the foregoing, the Court of Appeal's erroneous paraphrasing of critical testimony constitutes reversible error upon which the Order denying rehearing dated March 1, 1983 should be reversed.

C. Potential Criminal Prosecution

There is an overriding constitutional issue of first impression which must be a subject of consideration by this Court.

Assuming, arguendo, that the Trial Court erred in its finding of fact as to incendiarism, then and in that event such hypothetical error necessarily permitted the conclusion that the plaintiff or his agents had committed an act of arson. Stated from another perspective, in the absence of a finding of incendiarism there could not have been a finding of arson.

Accordingly, on the basis of the decision of the Trial Court, as sustained by the Circuit Court, the plaintiff-appellant policyholder remains exposed to prosecution by criminal authorities for the crime of arson. On the same assumption for the sake of argument that error was committed by the Trial Court with a resultant factual determination that the plaintiff had not committed civil arson, then and in that event this plaintiff would be free from any exposure to criminal prosecution by the appropriate authorities under the doctrine of collateral estoppal, i.e., innocence presumed on the basis of a lesser burden than that which would have been necessary by a finder of the facts in a criminal proceeding.

In fact, on information and belief, this fire and its origin remain an open subject of investigation in the office of the Richmond County District Attorney. The serious overtones stated hereinabove, it is respectfully submitted, require the closest scrutiny and reexamination of the pattern of facts which led to the Court's conclusion of incendiarism.

Additionally, and notwithstanding the serious exposure to potential criminal prosecution, a serious economic impact of a negative nature must necessarily be felt by the petitioner as a result of the implications and aspersions extant within the business and social community in which this matter took place. Such ramifications will necessarily severely impact the appellant from future economic attainments and accordingly constitute a potential deprivation of his rights under the due process of the United States Constitution.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant certiorari to consider the important constitutional and procedural questions presented.

Respectfully submitted,

FRANK A. WEG
Attorney for Petitioner

APPENDIX A—Court of Appeals Decision Denying Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the first day of March, one thousand nine hundred and eighty-three.

DEMYAN'S HOFBRAU, INC.,
Plaintiff-Appellant,

v.

INA UNDERWRITERS INSURANCE CO.,
Defendants-Appellees.

No. 82-7614

UNITED STATES COURT OF APPEALS
FILED
MAR 1 1983
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Demyan's Hofbrau, Inc.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
s/ Francis X. Gindhart
by Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX B—Court of Appeals Decision Affirming District Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of January, one thousand nine hundred and eighty-three.

Present: HONORABLE WILLIAM H. TIMBERS
HONORABLE JON O. NEWMAN,
HONORABLE LAWRENCE W. PIERCE,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
JAN 6 1983
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

DEMYAN'S HOFBRAU, INC.,
Plaintiff-Appellant.

v.

INA UNDERWRITERS INSURANCE CO.,
Defendant-Appellee.

82-7614

ORDER

Plaintiff Demyan's Hofbrau, Inc. appeals from a July 15, 1982, judgment of the United States District Court for the Southern District of New York (Milton

Pollack, Judge) dismissing, after a non-jury trial, plaintiff's claim for proceeds allegedly owed under an insurance policy written by defendant INA Underwriters Insurance Company. INA insured a restaurant owned by plaintiff. On January 8, 1980, one day prior to the expiration of plaintiff's insurance policy, plaintiff's restaurant was substantially damaged by fire. The District Court's decision to release INA from any obligation to compensate plaintiff for the damage resulting from the fire was based on its finding that the fire was intentionally set by plaintiff. Plaintiff now contends that the District Court's finding of arson was clearly erroneous. Because out examination of the record indicates otherwise, we affirm the judgment.

According to the testimony of two fire marshals, an examination of the restaurant after the fire was extinguished revealed substantial traces of flammable liquid, or fire "accelerant," in three locations on the first floor. In each of these locations, the fire marshals discovered an "inverted cone" showing the upward and outward spread of the fire, and a "burn pattern" of severe charring close to the floor level. If credited, this testimony provides adequate support for the District Court's finding that the fire was intentionally set on the first floor of the restaurant.

Plaintiff argues that the testimony of Battalion Chief Gallagher required the District Court to reject the testimony of the fire marshals, and to find that the fire originated in an area near the roof of the restaurant, where no traces of arson were exhibited. Gallagher entered the building through a utility room door, a few minutes after several firemen had already forced their way in. In response to plaintiff's ques-

tions, Gallagher testified that he would have observed any lower level fires that had been started by "accelerant," that he did not observe any lower level fires, and that the fire originated in an airspace below the ceiling. In response to defendant's questions, Gallagher testified that visibility within the building was "almost zero," that lower level fires close to the entrance from which Gallagher made his observations would have been extinguished before he entered the restaurant, and that when he made his observations he was primarily concerned with tasks more urgent than establishing the origin of the fire.

Gallagher's responses to defendant's questions substantially diminished the probative force of those portions of his testimony that are emphasized by plaintiff. Thus weakened, those portions of testimony are insufficient to require discrediting the fire marshals' testimony as a matter of law. The District Court's finding of arson was not clearly erroneous.

Having found that the fire resulted from arson, the District Court went on to make the additional and distinct finding attributing responsibility to plaintiff. The record provides adequate support for this second finding, the propriety of which is not contested on this appeal.

The judgment of the District Court is affirmed.

s/ Wm. H. Timbers

s/ Jon O. Newman

s/ Lawrence W. Pierce

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX C—District Court Decision

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEMYAN'S HOFBRAU, INC.,
Plaintiff,

v.

INA UNDERWRITERS INSURANCE CO.,
Defendant.

DECISION
FINDINGS AND OPINION

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MILTON POLLACK, U.S. District Judge.

Milton Pollack, District Judge.

In the early morning of January 8, 1980, a three-alarm fire partially damaged the four story, 100 year-old building which, for more than 20 years, had housed Demyan's Hofbrau, a public restaurant, catering establishment and bar in Staten Island. Previously, the premises were used as a brewery. After the fire, plaintiff demolished the Hofbrau building and discontinued in the restaurant business.

Plaintiff Demyan's Hofbrau, Inc., which operated the Hofbrau, is a New York corporation and was owned in equal parts by two brothers, John and Frank Demyan. (The latter died in October 1978 leaving an estate.) The Demyan's real estate holdings which consisted of the Hofbrau building and seven other rental commercial and residential properties adjacent to the Hofbrau were deposited in a second corporation, Demyan's Realty, Inc., also half-owned by each brother.

On February 18, 1981, plaintiff filed this diversity suit to collect the fire insurance policy limits of $300,000, for damage to the building and of $150,000, for damage to its contents, from defendant, INA underwriters Insurance Co. ("INA"). INA thereupon raised the defenses of arson and plaintiff's implication therein and false swearing by the assured in submitting its proof of claim thereby voiding the insurance.

This case was heard at a Bench trial by the Court without a jury. At the close of trial, the Court made interim findings of fact regarding the incendiary, non-accidental character of the fire and the partial nature of the damage to the building. The Court found:

> It has been clearly proved by the defendant and not contradicted by any acceptable evidence worthy of

belief, that the fire on January 8, 1980 was of incendiary, non-accidental origin. There were two and perhaps three points of origin of fire, separate and separated, which were caused in each location by a supplied flammable liquid or accelerant to the premises. There was no evidence which is credited by the court of any other cause for the outbreak of the fires. The location of the points of origin and the inverted cones and the pooling make it clear and convincing beyond peradventure of doubt that arson was the cause at each of the two or perhaps three separate and separated portions of the insured premises.

Furthermore, it is unquestionable that the premises were not a total loss, and that the destruction by fire was partial only.

The Court then requested post-trial briefs on several remaining issues to be decided, viz.: 1) the complicity, if any, of the insured with the arson; 2) whether there was clear and convicing evidence that intentionally false statements regarding proof of loss were made; and 3) assuming that the Court might reach this question, what damages were compensible and under what terms of the policy.

After consideration of the briefs as well as all the testimony and exhibits that were submitted, and on due deliberation, the Court concludes that plaintiff is barred from any recovery on the policy, since on the preponderance of the evidence the Court finds that the assured was implicated in causing the fire which damaged the Hofbrau. In view of these dispositions of the arson issues, the other defense of deliberate false swearing in the proof of claim and the objections to plaintiff's damage proof need not be considered.

The burden of proof

In New York, the burden is on the insurer to prove the defense of arson and the assured's implication therein, by a fair preponderance of the credible evidence. *Johnson v. Agricultural Ins. Co.*, 25 Hun 251 (4th Dep't 1881).[1] In this regard, since "[d]irect proof

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1. In a footnote set out in *C-Suzanne Beauty Salon, Ltd. v. General Ins. Co. of Am.*, 574 F.2d 106, 112 n.9 (2d Cir. 1978), it was suggested that "clear and convincing evidence" is required in New York to establish the defense of arson—the same standard as in fraud cases.

The reference in the footnote when read in its context clearly relates to the proof of loss, not to the question of arson of the assured alone, since the law in New York is clear, as stated in the *Johnson* case cited in the text above. Indeed, the great weight of authority in other states establishes that the arson origin of a fire attributable to the assured may be established by a preponderance as distinct from the fraud standard of evidence. *See, e.g., Vicksburg Furniture Mfg., Ltd. v. Aetna Casualty & Surety Co.*, 625 F.2d 1167, 1169 (5th Cir. 1980) (Miss. law); *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 349 (7th Cir.), *cert. denied*, 421 U.S. 1011 (1975) (Ill. law); *Connecticut Fire Ins. Co. v. Fox*, 361 F.2d 1, 6 (10th Cir. 1966) (Wyo. law); *J & H Auto Trim Co. v. Bellefonte Ins. Co.*, 501 F. Supp. 942, 960 (M.D. Fla. 1980) *rev'd on other grounds*, 677 F.2d 1365 (11th Cir. 1982); *Godwin v. Farmers Ins. Co. of Am.*, 129 Ariz. App. 416, 631 P.2d 571, 573-74 (1981); *MFA Mutual Ins. Co. v. Pearrow*, 245 Ark. 795, 434 S.W. 2d 269, 272-73 (1968); *Klayman v. Aetna Casualty & Surety Co.*, 501 P.2d 750, 752 (Colo. App. 1972); *Werner's Furniture, Inc. v. Commercial Union Ins. Co.*, 39 Ill. App. 3d 59, 349 N.E. 2d 616, 620-21 (1976); *Osvaldo Varane, Inc. v. Liberty Mutual Ins. Co.*, 362 Mass. 864, 284 N.E.2d 923, 924 (1972); *George v. Travelers Indemnity Co.*, 81 Mich. App. 106, 265 N.W.2d 59, 62 (1978); *Quast v. Prudential Property & Casualty Co.*, 267 N.W.2d 493, 495 (Minn. 1978); *Pacific Ins. Co. of N.Y. v. Frank*, 452 P.2d 794, 706 (Okl. 1969); *Greenberg v. Aetna Ins. Co.*, 427 Pa. 494, 235 A.2d 582, 583-84 (1967); *Raphtis v. St. Paul Fire & Marine Ins. Co.*, 86 S.D. 491, 198 N.W.2d 505, 507 (1972); *Great American*

of arson is seldom available," it is well settled that arson may be established by circumstantial evidence. *Elgi Holding, Inc. v. Insurance Co. of North America*, 511 F.2d 957, 959 (2d Cir. 1974); *Shawanga Holding Corp. v. New York Property Ins. Underwriting Ass'n*, 57 A.D.2d 677, 394, N.Y.S. 2d 69, 70 (3d Dep't 1977).

Opportunity to Fire the Building

In his testimony, John Demyan named only four persons who had keys and access to the Hofbrau premises: John Demyan, his sister-in-law, Patricia Demyan, his son, John Demyan, Jr. and a bartender (unnamed in Demyan's testimony). The day after the fire John Demyan told the Fire Marshall that his niece, Denise Demyan, and his cook, Steve Jacobson, also had keys to the Hofbrau. In his statement he named the bartender who held the key as David DiCarlo. None of those three were witnesses at the trial. Demyan, in his testimony, did not mention Harold Coyle, the other bartender.

Harold Coyle was called as a witness for the plaintiff at the trial. He also tended bar and did catering jobs. He testified that it was he who went around the building at closing time on the early morning of the 8th January 1980 and he checked all the doors to the premises, turned off the lights, inside and in the parking lot, cleaned up the bar and swept up and about 3 A.M. he left with David DiCarlo, the other bartender,

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Ins. Co. v. K & W Log, Inc., 22 Wash. App. 468, 591 P.2d 457, 459-60 (1979); 22A J. Appleman, *Insurance Law and Practice* §13876 (1979); 19 *Couch on Insurance* §79:473 (2d ed. 1968). *But see Carpenter v. Union Ins. Soc. of Canton, Ltd.*, 284 F.2d 155, 162 (4th Cir. 1960); *Jonas v. Northeastern Mutual Fire Ins. Co.*, 44 Wis. 2d 347, 171 N.W.2d 185, 187 n.1 (1969).

through the bar-room front door which they locked from the outside. They set the switch to the burglar alarm located on the outside of the door jamb. The first of the firemen who arrived on the scene testified that the front door was locked when he got there.

Coyle testified that when he left everything was in order in the premises, they were locked tight, there was no sign of fire anywhere. The only persons who had access to the premises were the Demyans and the employees named. John Demyan testified that he had taken the precaution to change the locks in the building twice a year since each bartender who closed up for him was issued a key. Coyle had been employed for about three years and DiCarlo had been an employee for a period of nine years.

John Demyan testified that at about five o'clock in the morning on January 8, 1980 he received a call from police who informed him of a fire at the Hofbrau. He dressed and rushed down to the restaurant, arriving at about a quarter after five. He testified that when he arrived he heard the burglar alarm ringing and "immediately ran to the front door", "the key to the alarm is on the outside, I wanted to turn it off" "I just went up to the door to turn the alarm off". He did not know why he wanted to shut the alarm off; that was just the way he reacted.

No one else who was at the scene at the time mentioned anything about hearing an alarm sounding or corraborated Demyan's testimony of an alarm sounding. The front door was still locked, unforced, when Demyan says he arrived there. The firemen made no mention in their testimony or in their departmental reports of hearing a burglar alarm sounding. Seeming-

ly, an activated alarm would imply that someone without a key or without knowledge of how to quiet the alarm system had gained access to the premises during the night.

John Demyan's mention of a burglar alarm turned vague and contradictory as his testimony progressed. In direct examination he stated that the alarm had been activated before he got there and that he had been able to turn off the alarm. On cross-examination he ventured that perhaps the firemen had activated the alarm when they forced the doors. On re-direct examination, however, he admitted that he had not shut off any alarm, that the alarm noise had continued on albeit he had gone to the front door (where the burglar alarm switch was located) to shut the noise off as soon as he had arrived at the scene. On further questioning Demyan fell back on the statement that he could not tell if the sound he had heard was from the burglar alarm or rather was from the fire bell which was activated by and connected to the sprinkler system.

The burglar alarm at the Hofbrau was an automatic dialer, which was set up to call Patricia Demyan, as well as the police, in the event of a break-in. Though she testified that she was at home the night of the fire, she did not receive a call from the automatic dialer. No one testified that the police had or had not received a call from the automatic dialer at any time, either before or after the firemen arrived.

The fireman who arrived with the first due company and whose job it was to force open the doors testified that all those he tried were locked. There were no signs of forced or unauthorized entry into the Hofbrau building during the night or the morning of the fire.

The exclusive opportunity to enter the Hofbrau building was with those who had access thereto with the keys; others lacked this opportunity and would have had to make a forcible entry to get in. No admissions or evidence placed any of the holders of the keys at the Hofbrau after it had been closed up for the night. John Demyan claimed that he had left the premises at about 11 P.M. on the 7th day of January while Patricia Demyan testified that she was at home that night. Coyle and DiCarlo closed up at about 3 A.M. The others named as key holders did not testify.

Motive

The evidence shows that Demyan's Hofbrau, Inc. had steadily been losing ground in the two or three years before the fire; its custom and earnings were diminishing and it conceivably was reaching the point where the business was no longer profitable enough to be continued. It had been experiencing financial stringency for quite some time. John's brother, Frank, died unexpectedly in October 1978, raising the problem of settling with his estate for Frank's half-interest in Demyan's Hofbrau and Demyan's Realty, for which there was no money to pay. The 100 year old building was assessed in 1979 for only $32,500 by the City (admittedly considerably below the theoretical market value, although no bidder for the premises was obtained in 1978-79 when the premises were listed for sale). In a statement to a Fire Marshal after the blaze, John Demyan had stated that the pre-fire value of the contents of the building was $100,000.

There is no evidence that any other person had any motive to set the Hofbrau on fire. John Demyan testified that he had no problems with his employees,

tenants or neighbors. He told fire investigators after the fire that he had no reason to believe anybody would set a fire in the Hofbrau.

John Demyan steadfastly denied that either he or anyone connected with the owners shared any complicity in the firing of the premises. He maintained at trial that the Hofbrau's business had remained relatively constant over the years; however, the evidence to the contrary shows that there was a substantial decline in the earnings, cash flow and customers in the period prior to the fire. During the same period, there was a substantial increase in the financial burdens faced by the Hofbrau.

A detailed reconstruction of the Hofbrau's financial picture has been hindered by the unexplained failure to salvage corporate records from the Hofbrau's office, which sustained only water, not fire damage. Patricia Demyan, who handled the books, testified that she had retrieved only the Hofbrau's checkbook, though she conceded that she had the opportunity to recover other records. As a result, at least the date books, which contained the records of the catering done by the Hofbrau, as well as the checkbooks for an account at Chemical Bank which could have shed light on the course of the Hofbrau's finances, were not produced at trial.

There was evidence that the paintings located in the premises were retrieved by John Demyan and that the circular bar was dismantled and located nearby. No evidence was adduced concerning the disposition of the personalty that was not damaged by the fire or located in places in the four story, multiple room structure, other than where the fires had taken hold.

The evidence gave no clue as to what disposition was made of the undamaged personalty.

A closer look at the financial situation during the few years before and up to the fire gives every suggestion of an enterprise going out of business either voluntarily or involuntarily.

The Hofbrau had not operated satisfactorily or profitably for several years prior to the fire. As demonstrated by its tax returns, the Hofbrau sustained a taxable loss for the four fiscal years ending April 30, 1978. In fiscal year 1975, the business sustained a taxable loss of $1,069. This loss jumped to $12,816 in fiscal year 1976, was reduced to $5,123 in fiscal year 1977 and was further reduced to $3,371 in fiscal year 1978. In 1979, the principals ceased drawing the weekly salaries theretofore taken.

There is also evidence to suggest that plaintiff was permitting the Hofbrau's physical plant to deteriorate in order to save on costs of maintenance and repair. John Demyan testified, without any back-up data to support his statements satisfactorily, that he spent $65,000 in 1965 to remodel rooms, $70,000 in 1966, and $20,000 in 1970. At any event, since then, the only significant renovation during the next nine years that he noted was the addition of a new tile floor to the barroom for a cost of $7,500. Moreover, the Hofbrau's deductions for depreciation on its federal tax returns dropped sharply from $19,094 in fiscal year 1975 to $2,235 in fiscal year 1976, $2,104 in fiscal year 1977 and $2,118 in fiscal year 1978.

Clearly, Demyan's Hofbrau, Inc. was being squeezed by strong financial pressures which increas-

ed steadily until the fire served effectively to massively damage the corporation's major asset and bring on the decision for the entire cessation of the catering, restaurant and bar business; no effort was made to take the Hofbrau back into business after the fire damage occurred. In further detail (although possibly repetitive) the chronology looks somewhat as follows:

Summer 1977:

Following an electrical blackout, John Demyan applied for a $30,000 loan from the SBA, alleging financial difficulties as a result of a spoilage loss caused by an interruption in refrigeration. Demyan testified that at the time he made the loan application, the Hofbrau was "hard pressed" financially. The business had never had a large cash surplus, and the spoilage loss caused cash flow stringency.

The loan application was denied.

Ten months after the fire, John Demyan was indicted and convicted of filing fraudulent misstatements in connection with this SBA application; he had obtained blank specimen invoices from suppliers which were fraudulently filled in.

December 1977:

The Hofbrau fell behind on the $347 a month payments required by a loan obtained from the SBA in 1970 and 1971.

When an investigator appeared for the SBA, Demyan explained that he was in arrears because business had declined. This, he said, was due to two factors: 1) New Jersey had lowered its drinking age (thereby removing the necessity for teenagers from that state to travel to adjacent Staten Island to drink) and 2) the shipping com-

panies, whose executives often ate lunch at the Hofbrau, had moved from Staten Island. Because of this, the number of lunches the Hofbrau served daily had declined from 150 to 40. In a personal financial satement submitted at the same time, Demyan claimed that his assets exceeded his liabilities by $116,000, and that the value of the real estate he owned was the value of his home, $80,000.

January 1978:
John Demyan made another application for a loan from the SBA, this time for $14,400, which also was denied.

June 1978:
John Demyan borrowed $25,000 for the Hofbrau from the Gateway National Bank, to be paid back at the rate of $824 a month. The bank required that Demyan personally guarantee the loan.

October 1, 1978:
John Demyan's brother, Frank, died. Frank Demyan owned half of Demyan's Hofbrau, Inc. and Demyan's Realty, Inc. He had worked nights at the restaurant and Mr. Sgroi, the Hofbrau's accountant, suggested that Frank Demyan's death was one of the reasons why the Hofbrau's sales declined in 1979.
Soon after his brother died, John Demyan listed the Hofbrau for sale with a Staten Island real estate firm, but received no inquiries or bids therefor. Out of the proceeds of the insurance on his brother's life, John Demyan received $58,000 and gave his sister-in-law Patricia $25,000. The amount due to Frank Demyan's estate for his interests in the Hofbrau and the real estate could not be paid.

Third Quarter 1979:
As evidenced by the payroll tax returns, the Hofbrau's payroll slumped $1,300 to $8,850 for the third quarter, 1979.

December 1978:
The Hofbrau again falls into arrears on the 1970/71 SBA loan.

July—September 1979:
Patricia Demyan went off the payroll so far as the weekly drawing previously paid to her deceased husband. John Demyan did not draw any salary from the Hofbrau by check, though he had customarily drawn $230 a week. On August 27, 1979, he submitted a form to the SBA in which he stated that he took home $150 a week, presumably in cash.

August 1, 1979:
John Demyan made a payment of three years of back business taxes for the Hofbrau of nearly $26,750, using the recent proceeds he had obtained from the sale of a house he had inherited from his parents.

August 27, 1979:
John Demyan told an SBA official investigating the arrears on his 1970/71 loan that "business was bad and they were unable to make payments." In supplying the official with financial information, Demyan stated that his sales were "low", that they were not providing a profit, and that he had debts that were past due.

September 28, 1979:
John Demyan obtained a loan from the Borg-Warner Finance Co. to pay the fire insurance premium on the Hofbrau.

December 1979:
The Hofbrau was burglarized and $3,200 in cash was stolen.

December 28, 1979:
Notice was mailed to Demyan by Borg-Warner Finance Co. that he is in default on the loan for the insurance premium and that the insurance will be cancelled effective January 9, 1980 on the Hofbrau.

At the time of the fire, the Hofbrau owed more than $14,000 to utilities and suppliers. The State claimed that the Hofbrau additionally owed $42,767 in back sales taxes for the period October 1, 1975 to April 10, 1978. This figure, disputed at the time, was later compromised at $22,186 plus interest. Moreover, there were still some $8,000 outstanding on the loan obtained in 1978 from the Gateway Bank, as well as approximately $17,000 outstanding on the 1970/71 SBA loan, of which $4,511 was in arrears.

Against these burdens, the Hofbrau's commercial bank account, less outstanding checks, contained $4,552.96. That the business' cash flow situation was dire is evidenced by the fact that the Hofbrau's bank account had been overdrawn on more than three occasions in the ninety days previous to the fire, once for more than $2,400. On another occasion, in early November, a total of five checks were returned by the bank because the account was overdrawn. Indeed, as late as December 26 two checks were returned for insufficient funds. The Hofbrau's cash flow was not likely to improve, since, as its accountant testified, sales were running at a rate 8-9 percent below those of the year before.

The obligation under a 1965 buy-sell agreement between the brothers to pay off Frank Demyan's estate for the latter's half-share of the companies, gave rise to a substantial liability in 1978 and remained unpaid and unpayable at the time of the fire. There were insufficient liquid assets in the businesses and in John Demyan's possession with which to pay off the debt.

In December 1965 John and Frank Demyan had executed a buy-sell agreement which covered their relationships as co-owners of Demyan's Hofbrau, Inc. and Demyan's Realty, Inc. According to the agreement, each brother was to procure $85,000 of insurance on the other's life, with the premiums to be paid by the corporations. Clause 6(a) of the agreement provided that, at the time of either brother's death, the insurance proceeds were to be collected by the surviving brother and paid over to the deceased's legal representative in partial payment for his share of the companies. Clause 6(b) obligated the survivor to pay the difference between the amount realized from the insurance and the value of the half share owned by the estate.[2]

When Frank Demyan died in 1978, there was only $50,000 worth of insurance on his life remaining in force, plus accrued interest and dividends. However, out of the proceeds of approximately $58,000 John Demyan paid only $25,000 to Patricia Demyan, Frank's widow and executrix. He called this payment

2. The obligation was payable by monthly notes of $625 with 4% interest. On default in payment of any note all became immediately due.

a "gift" in his testimony. Sometime in 1981, John Demyan memorialized an agreement reached with Patricia Demyan that he owed her an additional $100,000 for the estate's share of the two corporations. Only $5,000 was paid on account of that debt. The widow has received $1,000 a month as "interest" on the debt from April 1981 until the present day.

Taking account of the fact that the buy-sell transaction may not have been a truly arm's length bargain, John Demyan's acknowledgment that he owed his sister-in-law a total of $125,000 over-all for Frank Demyan's 50% interests, in lieu of the 1965 buy-sell agreement, still suggests that 100% of the combined assets of Demyan's Hofbrau and Demyan's Realty were not worth more than $250,000 at the time of the fire, far less than the $450,000 of fire insurance placed in 1979 on the Hofbrau building and its contents, alone. Even if, as John Demyan testified, the $100,000 was intended to be "[p]ayment for a possible sale of one-half portion of the commercial property which is two buildings," so that the $100,000 did not properly represent the entire value of Frank Demyan's half-share of both corporations, a debt of that size due to Frank's widow presented an impossibility of payment when and as required by the agreement, was certain to be a massive drain on the Hofbrau's already tight cash flow.

Summary

The picture of Demyan's Hofbrau, Inc. presented by the evidence was that of a business beleaguered by serious financial difficulties for more than a few years and then hobbled by the death of one of its principals and confronted with massive accumulated business and sales tax liabilities asserted by the State. Nothing John Demyan tried to do to cut costs, including delay-

ing payment on the Hofbrau's debts, reducing expenditures for maintenance and upkeep, and defaulting on the SBA loan, was effective in turning the business around.

The Hofbrau's impaired and failing fortunes, combined with the fact that only the Demyans and their employees had access to the premises, the fact that someone having familiarity with the building and possession of the keys was responsible for the two or three separate and separated points of origin of the fire caused by flammable liquids and accelerants placed at the widely separated points in the building and the fact that only the Demyans and plaintiff were shown to have had any motive for arson to seek relief by way of collecting on the insurance, are sufficient circumstantially to warrant the inference and finding that the arson fire was attributable to the assured. The preponderance of the credible evidence weighs in favor of the defendant's defense that the fires, of non-accidental, incendiary origin were induced or caused by the assured, its principals, agents or servants or that they were implicated therein.

Accordingly, it is concluded that the defendant is not liable to the plaintiff herein and the complaint is dismissed, with costs.

The foregoing, together with the Court's interim findings made at the conclusion of the presentation of the evidence, shall constitute the findings of fact and conclusions of law required by Federal Rules of Civil Procedure, 52(a).

SO ORDERED.

July 15, 1982

Milton Pollack
U.S. District Judge